Appendix A: Railway Labor Act

SECTION 3. First. There is hereby established, a Board to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the

Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing

of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon the award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

* * * * *

SECTION 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: *Provided, further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and, being certified by

the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

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Appendix B: Judgment on Arbitration Award

[February 28, 1964]

The Award of National Railway Labor Arbitration Board No. 282 having been rendered pursuant to Section 3 of the Joint Resolution of the Congress of August 28, 1963, Public Law 88-108, 88th Cong., having been duly certified and acknowledged under the hands of the arbitrators and having been filed in this Court as provided for by Section 4 of the said Joint Resolution and Section 8 of the Railway Labor Act; and

Petitions to impeach said award having been filed and heard by this Court in Civil Actions No. 2919-63 and No. 2921-63; and

This Court having rendered its decision on January 8, 1964, and having entered judgment on January 10, 1964, dismissing the said actions; and

The United States Court of Appeals for the District of Columbia Circuit having on February 20, 1964, affirmed the aforesaid judgments of this Court:

IT IS ORDERED, ADJUDGED AND DECREED that judgment is hereby entered on the arbitration award heretofore filed herein, which judgment is final and conclusive upon the parties.

ALEXANDER HOLTZOFF,
United States District Judge.

February 28, 1964.

Appendix C: Order of District Court

[May 11, 1964]

This matter came on to be heard upon the prayer of the carrier parties herein for injunctive relief in their Motion for Supplementary Relief Based upon Judgment on Arbitration Award, supported by affidavits and attached documents, upon the Response to Order to Show Cause and Countermotion for Injunctive Relief filed by the Brotherhood of Locomotive Firemen and Enginemen et al., supported by affidavit and attached documents, and upon additional affidavits and attached documents submitted by the carrier parties.

The Court upon due consideration of the aforesaid papers, the memoranda of points and authorities submitted by the parties and oral argument on their behalf, having determined that the Brotherhood of Locomotive Firemen and Enginemen through its officers, agents, employees, members and persons acting in concert with them is threatening to engage in strikes or work stoppages against the carriers, or to picket the premises of such carriers, over a dispute or disputes as to the meaning or application of the Arbitration Award upon which judgment heretofore has been entered in this proceeding, unless enjoined by this Court; that such strikes, work stoppages or picketing are illegal under Public Law 88-108 and the judgment heretofore entered in this proceeding upon the Award by Arbitration Board No. 282; that such strikes, work stoppages or picketing will cause irreparable injury to the carriers; that injunctive relief against such strikes, work stoppages and picketing is necessary to prevent such irreparable injury and to protect and preserve the jurisdiction of Arbitration Board No. 282 over the disputes concerning the meaning and interpretation of its Award and of the Court over the rulings made by the Board with respect to such disputes; and, assuming that the Court has jurisdiction to condition such injunctive relief upon the carriers refraining from the implementation of disputed applications of the Award pending determination of those disputes by the Board or to enjoin the carriers from so acting, that the

circumstances do not justify the imposition of such a condition or the granting of such an injunction;

IT IS HEREBY ORDERED:

1. That the Brotherhood of Locomotive Firemen and Enginemen, its officers, agents, employees, members and all persons acting in concert with them, be and they hereby are permanently enjoined from authorizing, calling, encouraging, permitting, or engaging in any strikes or work stoppages, and from picketing the premises of the carriers, over any dispute as to the meaning or application of the Arbitration Award on which judgment heretofore has been entered in this proceeding;

2. That the Countermotion for Injunctive Relief is in all respects denied; and

3. That this Court reserves jurisdiction for the purpose of enabling any of the parties to this proceeding, or any person that may be or may hereafter become bound in whole or in part by this order, to apply to this Court at any time for such further orders as may be necessary or appropriate for the construction, carrying out or enforcement of this order or of the judgment heretofore entered in this proceeding upon the Award by Arbitration Board No. 282, or any legal obligation resulting therefrom.

ALEXANDER HOLTZOFF,
United States District Judge.

Dated: May 11, 1964.

Appendix D: Opinion of District Court *

[March 28, 1966]

The Court: This is a motion by the Brotherhood of Locomotive Firemen and Enginemen for an order declaring that the Southern Pacific Company and all other carriers represented by certain Conference Committees are obligated, pursuant to the judgment heretofore entered in this proceeding upon the Award rendered by Arbitration Board No. 282, to pay the claims of their respective locomotive firemen employees for loss of wages and loss of other forms of remuneration caused to them by alleged violations by the carriers of the Arbitration Award, and that the validity of those claims is not dependent upon their being filed and processed in the manner prescribed by Section 17 of a collective bargaining agreement entered into on August 11, 1948.

Specifically, the claims that are enumerated in the papers attached to the motion are claims of firemen who alleged that they would have been employed on certain days if the carriers had not operated certain engines without a fireman in violation of the terms of Award 282.

The claims are for the wages that the firemen in question would have earned had they been employed on those days, as they claim they should have been.

The carriers contend that the claims should be submitted and handled pursuant to certain provisions contained in a collective bargaining agreement dated November 1, 1948. These provisions are contained in Section 17 of that agreement and provide for an administrative remedy consisting of several steps within the organization of the carrier. The claims must be submitted within sixty days after the date on which it arose.

If eventually the claim is denied, recourse would be had to the National Railroad Adjustment Board.

It is claimed by the moving parties that there is no obligation to submit the claims for a determination by the administrative process in the first instance.

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* Reported at 253 F. Supp. 532.

Section 17 starts out by providing that, "All claims or grievances arising on and after November 1, 1948 shall be handled as follows." There follows a detailed outline of the procedure.

To be sure, if this language is construed literally, the claims here presented would be subject to the provisions of Section 17 and the remedy provided by Section 17 would be exclusive.

However, it was subsequent to the date of the 1948 agreement that the compulsory arbitration resulting in Award 282 was undertaken.

After that arbitration was concluded an action to impeach the Award was brought by some of the parties. That action resulted in a determination that the Award was valid.

Section 9 of the Railway Labor Act, 45 U. S. Code, 159, paragraph Second, provides that in such an event the "court shall enter judgment on the award, which judgment shall be final and conclusive on the parties."

Consequently, there is presented here a judgment of this Court confirming the Award. This Court, like all courts, has the authority, in fact the duty, of enforcing its own judgments.

Only recently the Supreme Court held that an award of the National Adjustment Board is not only final and binding but may be enforced judicially, Gunther v. San Diego and Arizona Eastern Railway Company, 382 U. S. 257.

So, too, the Supreme Court has held that the mere fact that there is an administrative remedy in existence in respect to a grievance of an employee of a railroad company does not bar his resort to the courts, Moore v. Illinois Central Railroad Company, 312 U. S. 630.

The question before the Court is not whether the claimants have a right to resort to the grievance procedure. The question is whether they are obligated to do so.

The Court is of the opinion that the prior agreement may not oust the court of jurisdiction to determine a claim arising subsequently.

It is quite clear that the parties could not have had in contemplation the possibility of a compulsory arbitra-

tion sometime in the future terminating in a judgment of the court and could not have intended to provide that if there should be any claims arising under an unanticipated award or the judgment, the grievance procedure should be exclusively applicable.

The Court is of the opinion, therefore, that a claimant—and when I say a claimant, I mean the claimants involved in this motion—may resort either to the grievance procedure prescribed by Section 17 or may apply to the Court to enforce the judgment of this Court.

This is not to say that the Court will pass on every alleged claim for money individually which may be asserted under the Award. The Court may always invoke the doctrine of forum non conveniens.

But insofar as the claims here involved are concerned the Court is of the opinion that they may be judicially entertained without resort to the procedure under Section 17 of the 1948 agreement.

A somewhat similar conclusion was recently reached by Judge Simpson of the United States District Court for the Middle District of Florida, in an unreported opinion, in Order of Railroad Conductors and Brakemen and Brotherhood of Locomotive Firemen and Enginemen v. Florida East Coast Railway Company, rendered on February 28, 1966.

In that case the court made the following statement in regard to provisions providing for an internal grievance procedure: "Those provisions of the contract imposing time limitations upon the processing of individual grievances, specifically those contained in Article 19 of said agreement, have no application to and impose no limitation on this Court's power to enforce its injunction entered January 6, 1965 in this cause."

I concur with the principle on which that statement is based and reach the conclusion that the limitations prescribing the use of grievance procedure within a certain specified period have no application and impose no limitation on the power of this Court to enforce its judgment confirming the Award of Board 282.

Counsel may submit a proposed judgment in accordance with this ruling.

The Court might add that the case of Republic Steel Corporation v. Maddox, 379 U. S. 650, is clearly distinguishable because that case involved a claim for money due under a collective bargaining agreement, whereas in this case we are confronted with a claim under an award of a compulsory arbitration board established by Congress, the award having been later confirmed by the Court.

Appendix E: Order of District Court

[April 6, 1966]

This matter came on to be heard on February 16, 1966, and March 28, 1966, and the Brotherhood of Locomotive Firemen and Enginemen having filed a Memorandum of Points and Authorities and affidavits in support of its Motion, and the Southern Pacific Company and other carriers having filed a Memorandum of Points and Authorities and an affidavit in opposition to said Motion and a Supplemental Memorandum of Points and Authorities, and the Court being fully advised and having delivered its Opinion on said Motion on March 28, 1966, it is hereby

DECLARED AND DECREED, that claims or grievances of the Brotherhood of Locomotive Firemen and Enginemen and the firemen (helpers) it represents, referred to in the motion, based on alleged violations or misapplications of Award of Arbitration Board No. 282, on which Award judgment was entered by this Court on February 28, 1964, are not subject to the compulsory grievance procedure established by section 17 of a certain collective agreement entered into on August 11, 1948 by the Brotherhood of Locomotive Firemen and Enginemen and other labor unions on the one hand and on the other hand by the Southern Pacific Company and numerous other carriers; and such claims or grievances, if otherwise valid, may be enforced without the Brotherhood or the employees it represents first resorting to the procedure established by section 17 of the said 1948 agreement.

/s/ ALEXANDER HOLTZOFF,
United States District Judge.

April 6, 1966

Appendix F: Opinion of District Court *

[June 2, 1966]

The Court: By its decision of March 28th, 1966 this Court ruled on a motion made by the Brotherhood of Locomotive Firemen and Enginemen that locomotive firemen who had claims for loss of wages or other forms of remuneration caused by failure to employ them on certain days because of violations of Arbitration Award 282 had a choice of remedies, either an administrative remedy prescribed by the collective bargaining agreement or by a judicial proceeding in this court or in other courts that have jurisdiction.

The carriers involved in that motion have now moved to amend the order so that it would provide, in effect, that if a claimant instituted an administrative remedy and abandoned it before the remedy was concluded, he may not then resort to a judicial remedy.

Obviously if a claimant had pursued the administrative remedy to the end, including an appeal to the special adjustment board and had not prevailed, he would be barred from pursuing a judicial remedy. The question here presented is a narrow one. Suppose he abandons his administrative remedy in the course of pursuing it and before he reaches the consummation of that remedy, may he then resort to a judicial remedy.

It must be borne in mind that some of these claims arise out of what might be called a safety provision in Award 282. The basic background of those aspects of the Award which relate to dispensing with the use of firemen on most freight engines is that while two men are necessary in a locomotive cab, actually there were three men on freight engines, the third man being the head brakeman, and that one of them could be dispensed with and that was the fireman. There was a provision that in yard service engines could be operated without a fireman, provided they were equipped with a deadman's button.

Several of the claims involved in this motion arise out of the fact that on several occasions road engines were

* Reported at 255 F. Supp. 290.

used in yard service without a fireman and, naturally, road engines were not equipped with deadman's buttons. Consequently, the claims of firemen who would have been employed on those occasions for the wages that they would have earned, although are somewhat synthetic and artificial, they are a means of enforcing or imposing a sanction on failure to comply with this provision which has an aspect of safety.

Other claims arise from failure to use firemen under other circumstances where, perhaps, safety was not involved.

Counsel for the plaintiffs makes a very cogent argument, basing it on a line of cases arising out of collective bargaining agreements which provide for an administrative remedy. The cases in question hold that even if there is a remedy by way of a judicial proceeding, once the claimant, that is, the employee, resorts to his administrative remedy he is bound to exhaust it.

The situation here is different. These claims do not arise under a collective bargaining agreement. To be sure, this Court has held that the Arbitration Award—and it must be borne in mind that it was a compulsory arbitration prescribed by the Congress—had some of the same effects that a collective bargaining agreement would have and that it created a new status by way of conditions of employment and so on, a status that cannot be changed except by recourse to the Railway Labor Act. But the Award had certain additional weight beyond that which would make it equal to a collective bargaining agreement. It was an award of a compulsory arbitration board which was, in an action to impeach it, confirmed by this Court in a proceeding resulting in a judgment of this Court. It was because of this difference, in part, at least, that the Court held that the administrative remedy was not exclusive because the administrative remedy applied to claims under collective bargaining agreements.

We then must resort to basic principles. There is indeed a doctrine known as election of remedies and there are cases that hold, in effect, that if there are two remedies, if the claimant elects one he may not thereafter abandon it and pursue another. But this is too broad a statement.

The better doctrine is that election of remedies is binding only if the second remedy that is sought to be invoked is based on a theory which is irreconcilable with that upon which the first proceeding was founded. We have, of course, the familiar example of a person suing for recission of a contract on the ground that it was obtained by fraud, who may not thereafter ratify the contract and sue for damages, the theory being that the second remedy is irreconcilable and inconsistent with the first.

But if the two remedies are not inconsistent and are not irreconcilable, the doctrine of election of remedies does not apply. This was held in a case decided many years ago by the Court of Appeals for the Second Circuit, Equitable Trust Co. of New York v. Connecticut Brass & Mfg. Corp., 10 F. 2d 913. It should be noted that Judge Learned Hand was a member of the panel that sat in that case and concurred in the decision.

So it seems to the Court that as a matter of pure theory of law there is no inconsistency here and that therefore there should be no bar to pursuing the judicial remedy after abandoning the administrative remedy subsequent to its institution.

The situation would be different if the administrative remedy had been pursued to the end and a definitive rejection of the claim had been reached.

But there are practical considerations here. There was a period of uncertainty in which a claimant could not be sure whether he had a judicial remedy or an administrative remedy or both, and it was not unnatural for him to protect himself by filing a claim in view of the fact that there was a sixty-day limitation upon the filing of the claim. So, too, it must be borne in mind that these claims were not filed through lawyers; they were filed by employees, who are not legally trained, in their own behalf.

It might be argued, of course, that there must be some time limitation. That was argued before this Court on a previous occasion. It seems to this Court that the Supreme Court has answered that in a recent decision in which it held that the local statutes of limitations would apply to claims of employees.

In view of these considerations the Court reaches the conclusion that a claimant presenting a claim of the type involved in this motion for administrative consideration and who abandons his administrative remedy before it reaches a conclusion is not barred from pursuing such judicial remedies as he may otherwise have.

The motion is denied.

Appendix G: Opinion of Court of Appeals

[October 6, 1967]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before WRIGHT, TAMM and LEVENTHAL, *Circuit Judges.*

PER CURIAM: In prior proceedings the District Court enjoined the Brotherhood of Locomotive Firemen and Enginemen from striking over any dispute about the meaning or application of the award of Arbitration Board No. 282.[1] *In re Certain Carriers, etc.*, D.D.C., 229 F.Supp. 259 (1964). In its order the court reserved jurisdiction for any of the parties "to apply to this Court at any time for such further orders as may be necessary or appropriate for the construction, carrying out or enforcement of this order or of the judgment heretofore entered in this proceeding upon the Award by Arbitration Board No. 282, or any legal obligation resulting therefrom."

The court, in explaining its order, stated: "If the railroads take any step in carrying out the award which later turns out to be erroneous, any employee who has been damaged in the meantime must receive full restitution. There is no question that this would be the legal obligation of the railroads if such a situation arises." 229 F.Supp. at 260. The court further stated that if the railroads refused to comply with their obligations under the award the court "would compel them to comply." *Id.* at 261.

In the present proceeding before the District Court, the union sought redress on behalf of certain employees of the railroad for injuries resulting from alleged violations and misapplications of the award of Arbitration Board No. 282.

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[1] Arbitration Board No. 282 was convened pursuant to Public Law 88-108, 77 Stat. 132 (1963), 45 U.S.C. § 157 (1964), which provided for compulsory arbitration of a then pending labor dispute between the railroads and the unions. For the complete background of this litigation *see Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, D.D.C., 225 F. Supp. 11, *affirmed*, 118 U.S. App. D.C. 100, 331 F. 2d 1020, *cert. denied*, 377 U.S. 918 (1964).

The railroads challenged the jurisdiction of the court to grant relief on the ground that these claims of alleged violations of the award must be processed pursuant to the procedures of Section 3 of the Railway Labor Act. 45 U.S.C. § 153 (1964).

We agree with the District Court. That court sustained the award of Arbitration Board No. 282.[2] The award provides benefits and obligations on both sides in this labor dispute. On the petition of the railroads the court has enforced the award against the union. *In re Certain Carriers, etc., supra.* It likewise has jurisdiction to enforce the award against the railroads. The railroads, like the unions, are subject to the court's power to enforce its own decrees.

The general power of an equity court to impose conditions on those who seek equitable relief exists where an injunction is sought to enforce the provisions of the Railway Labor Act. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U.S. 528 (1960). There the carriers sought an injunction to prevent a strike over a "minor" dispute concerning their power, despite the collective agreement, to change "run" lengths and thereby eliminate jobs. Although there is no right to strike over a minor dispute, the Court sanctioned the issuance of an injunction conditioned on the carriers' refraining from imposing their view of the contract until the Adjustment Board finally determined the matter.

If the District Court's decree had used the approach sanctioned in *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co., supra,* and had conditioned the injunction on the carriers' refraining from acting under their view of Award 282 until disposition of the numerous specific disputes by either the Adjustment Board or Arbitration Board 282, this would have been a *de facto* suspension of Award 282 at variance with the spirit of the Act, which contemplated an immediate application of that award. Even assuming, but by no means deciding, that the carriers are right that these claims are minor disputes for which the contract provided a usual procedure within Section 3 of the

[2] *See Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co., supra* Note 1.

Railway Labor Act,[3] the District Court did not abuse its discretion in establishing a condition that employees injured by misapplication of the award have available a judicial remedy, and do not have to wait years for Adjustment Board vindication.[4]

Affirmed

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[3] The fact that a dispute is not a major dispute governed by § 6 of the Railway Labor Act, 45 U.S.C. § 156 (1964), does not necessarily mean that it is a minor dispute governed by § 3. *See* McGuinn, *Injunctive Powers of the Federal Courts in Cases Involving Disputes Under the Railway Labor Act*, 50 Geo. L. J. 46, 65-72 (1961); *compare Brotherhood of Railroad Trainmen* v. *New York Central R. Co.*, 6 Cir., 246 F. 2d 114, 117-119, *cert. denied*, 355 U.S. 877 (1957); *cf. Order of Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 341 (1960).

[4] The carriers did not appeal from the reservation of jurisdiction at the time the decree was entered. Assuming they did not lose their right to protest the condition—perhaps because protest at the time of the decree would have been premature in view of the generality of the reservation as entered—we now determine that the condition as implemented was not an abuse of discretion.

Appendix H: Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before: WRIGHT, TAMM and LEVENTHAL, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the District Court appealed from in this case are hereby affirmed.

It is further ORDERED by the court that appellee herein recover from appellants its taxable costs on this appeal, and have execution therefor.

Per Curiam.

Dated: October 6, 1967

Appendix I: Order and Memorandum of Court of Appeals

[December 15, 1967]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before: WRIGHT, TAMM, and LEVENTHAL, *Circuit Judges*, in Chambers.

ORDER

On consideration of appellants' petition for rehearing, appellee's answer, and appellants' reply, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam.

MEMORANDUM

A petition for rehearing filed by appellant carriers contends that our opinion of October 6, 1967, is inconsistent in certain respects with our opinions of May 12, 1967, and July 31, 1967, in *BLFE* v. *Bangor and Aroostook R. Co.*, Nos. 20192, 20193, 20215 and 20216, — F. 2d —.

We provide this further analysis with full awareness that the terrain we traverse is so bumpy that we may be raising more dust than we settle, especially since issues can apparently be spun out *ad infinitum*.

The *Bangor and Aroostook* litigation was concerned with the period following the expiration of Award 282. This Court held that work rules established by Award 282 survived the expiration of that Award—a result sought by the carriers—on the theory that the substantive work rules established during the award's life (but not the procedures set up to modify work rules during the life of the Board) were "deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the Railway Labor Act unless and until changed in accordance with that statute." — F. 2d at —, (Supplemental Opinion July 31, 1967, Slip Opinion at 8)

It does not necessary follow, as the carriers suppose, that each and every contract provision established in former years by the parties to implement work rules settled purely

by agreement were applicable with full vigor to implement the work rules provided by agreement as constructively enlarged to embrace work rules effectuated by Board 282.

We need not pursue that line of thought, for in the case of appellant Southern Pacific the lawsuit was not focused on the legal constructs applicable to the period following the expiration of the award. The underlying action was brought by the carriers during the lifetime of the award, to adhere to the award. The carriers cannot fairly contest the Court's authority to establish the condition under discussion; on their claim to require the union to refrain from action violating a duty resulting from the award they could not fairly contest jurisdiction to issue an injunction on a cross-claim to require carriers to abide by their duties under the Award.

Furthermore, there is sound equitable basis for omitting the claims-and-grievance procedure established in 1948 and 1949 agreements, even assuming its applicability. Concepts of exhaustion of remedies will not be pursued with remorseless logic, at least in situations not fairly contemplated when the remedies were established, when the consequence would contravene basic expectations of justice by mandating a futile or unduly protracted procedure. *United Protective Workers* v. *Ford Motor Co.*, 194 F.2d 997, 1000 2 (7th Cir. 1952); *United Protective Workers, Local No. 2* v. *Ford Motor Co.*, 223 F.2d 49, 51 (7th Cir. 1955).

In this case the carriers are in effect urging that issues fully considered at pertinent top levels of management and labor are subject to an objection for failure to pursue remedies provided at lower levels even though the obvious purpose of those remedies was to winnow out the issues that need not come to the top.* Exhaustion under such circumstances would be a long circuit bypassing the practical and the just.

Petition for rehearing denied.

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* Cf. Pharmaceutical Mfrs. Ass'n v. Gardner, — U.S. App. D.C. —, 381 F. 2d 271 (1967) (McGowan, J.).